Filed 11/22/16 P. v. Moreno CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MARK A. MORENO, Defendant and Appellant.	2d Crim. No. B271771 (Super. Ct. No. MA067208) (Los Angeles County)

Mark A. Moreno appeals after a jury convicted him of attempted carjacking (Pen. Code,[1] §§ 215, 664) and possession of a firearm by a felon (§ 29800, subd. (a)(1)). The jury also found true the allegation that appellant committed the attempted carjacking while personally armed with a firearm (§ 12022.53, subd. (b)). The trial court sentenced him to 14 years and 6 months in state prison.

On October 16, 2015, David Fuentes was working at a car dealership when he saw appellant looking at a vehicle. Fuentes approached appellant, who said he wanted to look at

[1] All statutory references are to the Penal Code.

some trucks. Appellant walked over to a black truck and got in the driver's seat as Fuentes was talking to him. Fuentes got in the passenger's seat while holding the truck's keys in his hand. Appellant told Fuentes, "No, we don't need to test drive it. I will take it." Fuentes replied that they should go inside the dealership to discuss the details of the purchase and told appellant he should drive the truck to make sure he liked it.

Appellant said something about a "fast 500." Fuentes did not know what appellant was referring to or associate with anything relating to a credit score. Appellant then said he was just going to take the truck and told Fuentes to get out. He said something like "it is going to go bad for you if you don't let me take this truck." At that point, appellant pulled out a holstered or sheathed gun and held it on his lap. Fuentes nervously joked that appellant would have to shoot him if he wanted to take the truck and said it did not have enough gas for him to drive very far. Appellant replied, "It is hard to believe." He put the gun away, got out of the truck, and began walking away. Fuentes got out and videotaped appellant on his phone. Fuentes then went inside the dealership and reported the incident to his manager, who called the police.

The deputy sheriff who responded to the call drove toward a nearby park after receiving information that appellant was walking in that direction. The deputy saw appellant on the side of the street. Appellant hesitated, looked in the deputy's direction, and walked toward the center median. After briefly losing sight of appellant, the deputy detained him on the other side of the street. The deputy searched appellant but did not find a gun. The deputy then searched a tree in the center median and found a loaded 9-millimeter handgun with a sheath on it.

Fuentes identified appellant and the gun during an in-field showup. At trial, appellant stipulated that he had suffered a prior felony conviction for purposes of the charge of being a felon in possession of a firearm.

We appointed counsel to represent appellant in this appeal. After examining the record, counsel filed an opening brief in which no issues were raised. On September 1, 2016, we advised appellant that he had 30 days within which to personally submit any issues or contentions he wished us to consider.

In a timely response, appellant contends (1) his appointed counsel was "unprepared and unable to properly represent" him; (2) the prosecutor committed error during voir dire by asking prospective jurors if they could convict a defendant without any physical evidence and upon the basis of a single witness's testimony; (3) Fuentes admitted he was not afraid during the incident, that appellant asked him for a "fast 500 credit application," and that Fuentes had "fantasized" about a carjacking after seeing the movie "The Fast and the Furious;" (4) "[t]here was never a gun" and Fuentes merely described the alleged gun after being "shown a picture of some gun that [appellant has] never seen before;" and (5) the prosecutor committed misconduct during closing argument when she "repeatedly made false assumptions and stated them as facts." Appellant also asks us to review (1) DNA evidence that was purportedly "not available due to time restraints," and (2) the "shocking video footage" that Fuentes recorded, which purportedly "proved [Fuentes] was not truthful as it did not show [appellant] at all." Finally, appellant claims that "the trial did provide proof of a conspiracy involving [Fuentes] and although

not fully, it still provided enough truth to prove a reason of doubt [*sic*] enough for a reversal or at least a retrial."

None of appellant's contentions present an arguable issue for review. His first claim essentially alleges ineffective assistance of counsel, yet nothing in the record supports such a claim. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692 [a defendant claiming ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice].) His complaints regarding Fuentes's testimony are essentially attacks on his credibility, and issues of witness credibility were the exclusive province of the jury. (*People v. Boyer* (2006) 38 Cal.4th 412, 479-480.) To the extent appellant also claims that Fuentes's testimony was insufficient to support the finding that appellant had a gun, the claim fails. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].)

Appellant's complaints regarding the prosecutor lack merit because (1) the challenged question during voir dire was proper (*People v. Young*, *supra*, 34 Cal.4th at p. 1181); and (2) appellant fails to demonstrate that the prosecutor stated any "false assumptions," much less that she stated those assumptions "as facts." Because this is a direct appeal, we also reject appellant's request that we review "evidence" that was allegedly available yet never offered. If this potential evidence exists and it is exculpatory, appellant must file a petition for writ of habeas corpus. (*People v. Waidla* (2000) 22 Cal.4th 690, 703, fn. 1, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 646 ["An appeal is 'limited to the four corners of the [underlying] record on appeal'" while "[h]abeas corpus is not"].) Appellant's final claim

essentially rehashes his attack on Fuentes's credibility. There is no proof of a "conspiracy," and the evidence is sufficient to support the judgment.

We have reviewed the entire record and are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issue exists. (*People v. Wende* (1979) 25 Cal.3d 436, 443.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Lisa M. Chung, Judge
Superior Court County of Los Angeles

Christine M. Aros, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.